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6           UNITED STATES DISTRICT COURT  
7           WESTERN DISTRICT OF WASHINGTON  
8           AT SEATTLE

9           ASHLEY RASMUSEN,

10           Plaintiff,

11           v.

12           COMMISSIONER OF SOCIAL SECURITY,

13           Defendant.

14           Case No. C24-5238-SKV

15           ORDER AFFIRMING THE  
16           COMMISSIONER'S DECISION

17 Plaintiff seeks review of the denial of her application for Disability Insurance Benefits  
18 (DIB). Having considered the ALJ's decision, the administrative record (AR), and all  
19 memoranda of record, the Court **AFFIRMS** the Commissioner's final decision and **DISMISSES**  
20 this case with prejudice.

21           **BACKGROUND**

22 Plaintiff was born in January 1986, has at least a high school education, and has worked  
23 as a massage therapist, server, bartender, hostess, teacher aide, and bank teller. AR 26-27.  
Plaintiff has not been gainfully employed since her alleged onset date. AR 19.

On February 22, 2022, Plaintiff applied for benefits, alleging disability as of July 5, 2019.  
AR 213. Plaintiff's applications were denied initially and on reconsideration, and Plaintiff

1 requested a hearing. AR 116-17. After the ALJ conducted a hearing on March 7, 2023, the ALJ  
2 issued a decision finding Plaintiff not disabled. AR 42, 14-28.

3 **THE ALJ'S DECISION**

4 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found:

5 **Step one:** Plaintiff did not engage in substantial gainful activity during the period  
6 between her alleged onset date, July 5, 2019, and her date last insured, December 31,  
7 2022.

8 **Step two:** Plaintiff has the following severe impairments: asthma and obesity.

9 **Step three:** These impairments do not meet or equal the requirements of a listed  
10 impairment.<sup>2</sup>

11 **Residual Functional Capacity:** Through the date last insured, Plaintiff could perform  
12 light work with limitations: she could only stand or walk up to four hours, could sit for up  
13 to six hours, needed to avoid concentrated exposure to nonweather related extreme cold  
14 and nonweather related extreme heat, and needed to avoid even moderate exposure to  
15 respiratory irritants.

16 **Step four:** Plaintiff could have performed past relevant work as a Teacher Aide II  
17 through her date last insured.

18 **Step five:** As there are jobs that exist in significant numbers in the national economy that  
19 Plaintiff could perform, Plaintiff was not disabled between her alleged onset date and her  
20 date last insured.

21 AR 19-28.

22 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the  
23 Commissioner's final decision. AR 1-6. Plaintiff appealed the final decision of the  
Commissioner to this Court. Dkt. 4. The parties consented to proceed before the undersigned  
Magistrate Judge. Dkt. 2.

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<sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P., App. 1.

## **LEGAL STANDARDS**

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on harmful legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). Substantial evidence is “more than a mere scintilla. It means - and means only - such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

## DISCUSSION

Plaintiff argues the Commissioner “erred when review was denied by the [Social Security] Appeals Council despite Plaintiff’s submission of a disabling opinion authored by her treating pulmonologist.” Dkt. 11 at 1. The Commissioner argues Plaintiff’s new evidence fails to undermine the substantial evidence that supports the ALJ’s decision. Dkt. 14 at 1.

A. The Commissioner did not err because the ALJ's decision remains supported by substantial evidence.

The Court lacks jurisdiction to review a decision made by the Appeals Council to deny a request for review of an ALJ’s decision. *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012) (citing *Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011)). That is because an Appeals Council decision constitutes “a non-final agency action.” *Id.* Once the Appeals Council denies review, however, the ALJ’s decision becomes the final decision of the Commissioner and the Court has jurisdiction to review that decision for

1 substantial evidence based on the administrative record. *Id.* at 1161-62. Accordingly, “the  
 2 Appeals Council’s reasoning for denying review is not considered on judicial review.” *Luther v.  
 3 Berryhill*, 891 F.3d 872, 876 (9th Cir. 2018).

4 Instead, where, as here, the Appeals Council “considers” the new evidence “in denying  
 5 review of the ALJ’s decision, the new evidence is part of the administrative record, which the  
 6 [Court] must consider in determining whether the Commissioner’s decision is supported by  
 7 substantial evidence.” *Brewes*, 682 F.3d at 1159-60. The issue before the Court, therefore, is  
 8 more appropriately framed as “whether the ALJ’s decision remains supported by substantial  
 9 evidence” in light of the new evidence. *See Williams v. Berryhill*, 2018 WL 6737511, at \*3  
 10 (W.D. Wash. Apr. 19, 2018). The answer to this depends on whether there is a “reasonable  
 11 possibility that the new evidence would have changed the outcome of the determination.” *Luna  
 12 v. Astrue*, 623 F.3d 1032, 1034 (9th Cir. 2010) (cleaned up).

13 On April 25, 2023, the ALJ issued an unfavorable decision finding that Plaintiff was not  
 14 disabled between her alleged onset date, July 5, 2019, and her date last insured, December 31,  
 15 2022. AR 14-28. On June 27, 2023, Plaintiff submitted to the Appeals Council a pulmonary  
 16 medical source statement completed by her treating pulmonologist, Gretchen Ta, ARNP. AR 37-  
 17 41. The statement was dated March 9, 2023, two days after Plaintiff’s hearing before the ALJ  
 18 and just over three months after her date last insured. *Id.*; *see also* AR 19. In denying review,  
 19 the Appeals Council considered the medical source statement along with the rest of the  
 20 administrative record and found it was not reasonably probable the new evidence would change  
 21 the outcome of the ALJ’s decision. AR 2.

22 Despite this, Plaintiff argues that the Appeals Council “failed to comply with its own  
 23 regulations” by denying review “rather than granting review to evaluate the opinion.” Dkt. 11 at

1 6; Dkt. 15 at 2. But Plaintiff's argument holds no water. The regulation she cites in support, 20  
 2 C.F.R. § 404.970, does not require the Appeals Council to *grant review* for the purpose of  
 3 evaluating new evidence. Moreover, as discussed above, and as conceded by Plaintiff, the  
 4 Appeals Council's decision to not grant review is not subject to judicial review. Dkt. 11 at 7;  
 5 Dkt. 15 at 2.

6 Plaintiff further argues Ms. Ta's medical source statement "would change the outcome of  
 7 the [ALJ's] decision, and as such, the Court should remand for proper consideration of [it]."  
 8 Dkt. 11 at 9. She contends Ms. Ta's statement "provides very specialized functional opinions"  
 9 and that "[s]uch a detailed opinion is not otherwise present in the record." *Id.* at 8. But while  
 10 some parts of Ms. Ta's opinion are consistent with the medical record, many of her conclusions  
 11 are rebutted by it. For example, Ms. Ta opines that Plaintiff could not walk more than one block  
 12 before needing to rest or experiencing pain. AR 35. Yet in January 2022, Plaintiff reported  
 13 walking her son all the way to school.<sup>3</sup> *Id.* at 4, n. 1; *see also* AR 324. And in June 2022,  
 14 Plaintiff reported a "huge improvement" in her symptoms, to the degree that she was able to ride  
 15 an e-bike from Bremerton to Poulsbo. *Id.* at 3-4; *see also* AR 24, 470. Finally, in February  
 16 2023, she confirmed at an appointment with Ms. Ta that her "[s]ymptoms have remained well  
 17 controlled." *Id.* at 4; *see also* AR 24, 501. Ms. Ta also stated Plaintiff had "two significant  
 18 flares" of asthma in the 12 months preceding her opinion, which she wrote in early March 2023.  
 19 Dkt. 14 at 4; *see also* AR 34. But again, that is not reflected in the medical record. In June  
 20 2022, Plaintiff reported she had only needed one course of Prednisone since January 2022. *Id.*;  
 21 *see also* AR 470. And she confirmed in February 2023 that she had not needed her nebulizer  
 22 since her last visit. *Id.*; *see also* AR 501.

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23 <sup>3</sup> Plaintiff did report some chest tightness while walking her son to school, but this was while she was being treated  
 for an upper respiratory infection. *Id.*

1 Plaintiff correctly points out that “Ms. Ta’s records repeatedly documented how severe  
 2 and persistent her asthmatic condition was” during the relevant period, but that argument is  
 3 unavailing. Dkt. 11 at 9-10. Ms. Ta’s treatment records were part of the administrative record  
 4 the ALJ considered when issuing her decision, and based on that record, the ALJ concluded  
 5 Plaintiff was not disabled. *See, e.g.*, AR 21, 23-25, 404-69. At bottom, none of Plaintiff’s  
 6 arguments show how Ms. Ta’s opinion undermines the ALJ’s decision here. Plaintiff notably  
 7 does not argue the ALJ’s decision was not supported by substantial evidence in the first place,  
 8 and the Court will not “manufacture arguments where none is presented.” *Indep. Towers of*  
 9 *Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).

10 The Commissioner contends Ms. Ta’s medical source statement “would not change the  
 11 fact that substantial evidence supported the ALJ’s decision in this case.” *Id.* at 2-3. The Court  
 12 agrees. The regulations provide that “[t]he more consistent a medical opinion . . . is with the  
 13 evidence from other medical sources and nonmedical sources in the claim, the more persuasive  
 14 the medical opinion . . . will be.” 20 C.F.R. §§ 404.1520c(c)(2), 416.920c(c)(2). Given the  
 15 inconsistencies between Ms. Ta’s opinion and the medical evidence in the record, the Court finds  
 16 it unlikely the ALJ would be so persuaded by the opinion as to change the outcome of her  
 17 determination.

## 18 CONCLUSION

19 For the reasons set forth above, the Commissioner’s final decision is **AFFIRMED** and  
 20 this case is **DISMISSED** with prejudice.

21 Dated this 30th day of September, 2024.

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 S. KATE VAUGHAN  
 United States Magistrate Judge